MARIA C. ROBERTS, State Bar No. 137907
mroberts@sheastokes.com
RONALD R. GIUSSO, State Bar No. 184483
rgiusso@sheastokes.com
SHEA STOKES ROBERTS & WAGNER, ALC
510 MARKET STREET, THIRD FLOOR
SAN DIEGO, CALIFORNIA 92101-7025
TELEPHONE: (619) 232-4261
FACSIMILE: (619) 232-4840

Attorneys for *Specially Appearing* Defendant HARRAH'S ENTERTAINMENT, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER, Plaintiff, vs. HARRAH'S ENTERTAINMENT, INC. and DOES 1 through 100, inclusive, Defendants.	CASE NO. 07 CV 2226 DMS (POR) Judge: Hon. Dana M. Sabraw Mag. Judge: Hon. Louisa S. Porter *EX PARTE* APPLICATION FOR ORDER STRIKING THE NEWLY SUBMITTED MATTERS PRESENTED IN KINDER'S REPLY IN SUPPORT OF MOTION TO FILE AN AMENDED COMPLAINT OR, IN THE ALTERNATIVE, FOR A CONTINUANCE OF 14 DAYS TO ALLOW *SPECIALLY APPEARING* DEFENDANT TO FILE A SUR-REPLY AND RELATED PLEADINGS ACCOMPANYING PLEADINGS: MEMORANDUM OF POINTS & AUTHORITIES; DECLARATION OF RONALD R. GIUSSO; [PROPOSED] ORDER

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that *Specially Appearing* Defendant HARRAH'S ENTERTAINMENT, INC. will and hereby does apply to the Court *ex parte* for an order striking the newly submitted matter presented in KINDER's reply in support of motion to file an amended complaint or, in the alternative, for a continuance of 14 days to allow *Specially Appearing* to file a sur-reply and related pleadings addressing the new evidence and arguments raised in KINDER's Reply.

This *ex parte* application is made in good faith and, good cause exists as is more fully set forth in the attached points and authorities and supporting declaration. If the Court does not grant this *ex parte* application and strike KINDER's newly filed evidence and arguments, *Specially Appearing* Defendant's due process rights will be denied because it will not have an opportunity to address the newly raised arguments and new evidence submitted at the reply stage. Indeed, any opposing party's due process rights are violated and a trial court abuses its discretion if the court considers new evidence and/or new legal arguments filed for the first time in support of a reply brief. (*See, Beard v. Seagate*, 145 F.3d 1159, 1164-1165 (10th Cir. 1998).) KINDER had ample opportunity in his moving papers to submit evidence in support of his motion to amend and a proposed amended complaint. However, in an effort to bar *Specially Appearing* Defendant's right to present a complete opposition to KINDER's motion to amend, KINDER chose to wait until the reply stage to provide this court with the proposed pleading and supporting documentation. In addition, the new evidence submitted in the declaration of Chad Austin shows that Attorney Austin's purported "investigation" of additional corporate entities to be named was not in good faith as his new declaration includes "new investigations" which were conducted on January 17, 2008.

/ / /

/ / /

/ / /

This Court may not consider KINDER's new evidence and amended pleading without allowing *Specially Appearing* Defendant's to file a sur-reply lest, *Specially Appearing* Defendant's due process rights be violated. Violating *Specially Appearing* Defendant's due process rights by considering such untimely evidence would result in grave prejudice and irreparable harm to *Specially Appearing* Defendant.

In the alternative *Specially Appearing* Defendant's, requests this Court continue the hearing on KINDER's motion to amend for 14 days to allow *Specially Appearing* Defendant's 14 days to file a sur-reply and related pleadings. In its sur-reply *Specially Appearing* Defendant will address KINDER's newly submitted exhibits which should be stricken as factually invalid and inadmissible pursuant to the Federal Rules of Evidence. *Specially Appearing* Defendant will also address plaintiff's new jurisdictional arguments and the insufficiency of plaintiff's proposed amended complaint.

This *ex parte* application is based upon this notice and the attached memorandum of points and authorities, declaration of Ronald R. Giusso, and upon any oral argument as may be presented at the hearing on this matter.

SHEA STOKES ROBERTS & WAGNER, ALC

Dated: January 21, 2008

By: /s/ Ronald R. Giusso
Maria C. Roberts
Ronald R. Giusso
Attorneys for *Specially Appearing* Defendant
HARRAH'S ENTERTAINMENT, INC.